

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
HARBINGER F&G, LLC,

Plaintiff,

v.

OM GROUP (UK) Limited,

Defendant.
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: No. 12-CV-5315 (RA) (AJP)

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REPORT AND RECOMMENDATION
OF SPECIAL MASTER

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TO THE HONORABLE ANDREW J. PECK
UNITED STATES MAGISTRATE JUDGE:

The Report and Recommendation is submitted pursuant to the Order dated May 8, 2013, appointing me as a Special Discovery Master pursuant to Rule 53(a)(1)(C) of the Federal Rules of Civil Procedure for the purpose of assessing challenges by defendant OM Group (UK) Limited (OM) to certain documents that plaintiff Harbinger F&G, LLC (Harbinger) has withheld or redacted as privileged.

BACKGROUND

In April 2011, OM sold to Harbinger a Maryland-domiciled life insurance company, Fidelity and Guaranty Life Insurance Company (F&G Life). Under the terms of the governing contract (the SPA), Harbinger was to seek regulatory approval from the Maryland Insurance Administration (MIA) for the transfer of \$3 billion of F&G Life's assets to a reinsurance company (Front Street) owned by Harbinger (the Reinsurance Transaction). The reinsurer intended to hire an affiliated investment manager to invest up to \$1 billion of the transferred assets in high-yield securities to be held in an account known as the Trust Account. The other \$2 billion would be invested in a separate account, known as the Funds Withheld Account,

according to more conservative investment guidelines. Subject to various conditions, Harbinger was entitled to a refund of up to \$50 million (the Purchase Price Adjustment) in the event regulatory approval was denied. The MIA denied approval of the Reinsurance Transaction, and Harbinger demanded payment of the \$50 million Purchase Price Adjustment. OM refused, contending that Harbinger failed to satisfy the conditions for payment. This litigation ensued.

OM's challenges fall into two broad categories. First, OM asserts that based upon the information provided in Harbinger's privilege log, Harbinger has withheld or redacted communications with counsel that are not privileged because they contain no legal advice, but instead are communications concerning business issues that "happen to involve lawyers." Second, OM asserts that Harbinger has waived the privilege with respect to certain redacted and withheld documents by voluntarily and intentionally producing communications with counsel pertaining to Harbinger's efforts to reverse the decision by the MIA to deny approval of the Reinsurance Transaction. OM asserts that Harbinger has improperly engaged in the selective and unfair disclosure of certain documents, while simultaneously shielding others about "the same subject matter."

At issue in this case, and relevant to the issue of subject matter waiver, is whether Harbinger was obligated to undertake "Remedial Efforts," as set forth in Section 5.21(d) of the SPA, and if so, whether Harbinger satisfied this obligation. Section 5.21(d) provides in pertinent part:

In the event that a Governmental Entity requires that the terms of the Reinsurance Transaction be changed or altered in a manner that materially and adversely affects the economic benefits reasonably expected to be derived by Buyer thereunder, each of Buyer and Seller shall use its reasonable best efforts and cooperate and negotiate in good faith to agree to alternative terms that are acceptable to such Governmental Entity and provide benefits substantially similar to the benefits provided under the existing terms thereof ("Remedial Efforts"); provided that neither party shall have an obligation to so negotiate in good faith such alternative terms for a period of more than 150 days* * *.

Harbinger contends that it was not required to undertake Remedial Efforts because in issuing the denial of approval, the MIA did not require any change or alteration in the terms of the Reinsurance Transaction. Alternatively, Harbinger asserts that it in fact complied with the Remedial Efforts provision of the SPA. OM contends that the Harbinger was required to undertake Remedial Efforts, but failed to use its reasonable best efforts and cooperate and negotiate in good faith with OM to agree to alternative terms that would be acceptable to the MIA.

ASSERTION OF ATTORNEY-CLIENT PRIVILEGE/WORK-PRODUCT¹

Overview

There are 853 entries on Harbinger's privilege log of withheld documents, and 245 entries on Harbinger's privilege log of redacted documents. There is, however, substantial duplication in the documents withheld and redacted, in particular, multiple versions of the same email chains. Accordingly, while the sheer number of log entries might suggest an overly broad assertion of privilege, the number of unique documents or email chains that Harbinger has withheld or redacted is actually relatively small (I would estimate between 50 and 75). Although

¹ Paragraph 3 of the Order Appointing a Special Discovery Master directs the Special Master to file with the Clerk of the Southern District of New York (1) those documents that the Special Master finds Plaintiff has improperly withheld and must produce, and (2) those documents that the Special Master determines are partially privileged and that Plaintiff must produce in redacted form. All of the challenged documents were provided to me via access to a secure database maintained by Plaintiff. I therefore suggest that to the extent there are objections to this Report and Recommendation, Plaintiff should provide the challenged documents to the Court in such form as the Court may request. In connection with my review of the challenged documents, I have received and considered transcripts of hearings before Judge Peck, as well a letter submission from OM (dated May 22, 2013), annexing certain documents produced by Harbinger and the transcript of the deposition of Harbinger's lead outside counsel, Michael Devins, and a letter submission from Harbinger (dated June 5, 2013). I have also reviewed the exhibits referenced at the Devins deposition. Counsel are requested to provide these documents to Judge Peck in the event there are objections to this Report and Recommendation.

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I disagree with a number of Harbinger's privilege designations, I conclude that Harbinger has for the most part confined its assertion of privilege to communications whose predominate purpose is to solicit or render legal advice, and reject OM's assertion that Harbinger's privilege designations are overbroad because the designated documents are "communications concerning business issues that happen to involve lawyers," or "communications among individuals who work in an accounting or financial reporting capacity that are unlikely to involve legal advice." At the same time, however, the nature of the information provided with respect to a number of email chains provides support for OM's concerns. Harbinger has provided author and recipient information only for the last email in a chain, which not infrequently reflects a communication among non-attorneys or in-house counsel with arguably dual roles. While I appreciate the practical reasons for this limitation, it means that the log itself may not reflect earlier communications with outside counsel in the same chain that provide the basis for the claim of privilege. Moreover, information provided regarding the basis for the assertion of privilege is often "boilerplate" that makes it difficult to assess the claim of privilege. OM's request for *in camera* review of the withheld and redacted documents is therefore not without reasonable foundation.

Privilege Determinations

Pursuant to Paragraph 3 of the Order Appointing a Special Discovery Master, I have annexed two charts, setting forth by privilege log number my determinations regarding (1) documents withheld by Plaintiff that must be produced or redacted and (2) documents redacted by Plaintiff that must be produced in whole or in further part.

SUBJECT MATTER WAIVER

Rule 502(a) of the Federal Rules of Evidence provides that when "a disclosure is made in a federal proceeding* * *and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Subject matter waiver rests on the principle that a party may not use the attorney-client privilege as both a sword and a shield. The waiver aims to prevent prejudice to a party that may arise when a privilege holder releases only communications or portions of communications favorable to his litigating position, while withholding any unfavorable ones. Because notions of fairness underlie the principle of subject matter waiver, courts make determinations on a case-by-case basis, taking into account, among other things, whether a party's disclosure was demonstrably prejudicial to the other party.

It is undisputed that Harbinger has intentionally disclosed and waived the attorney-client privilege or work-product protection with respect to certain communications with counsel pertaining to Harbinger's "efforts to reverse the MIA decision" to deny approval of the Reinsurance Transaction. OM asserts that Harbinger has withheld or redacted communications that concern the same subject matter and that ought in fairness be considered together with the disclosed communications.

The crux of this issue is the scope of Harbinger's subject matter waiver. The Explanatory Note to Rule 502(a) indicates that if a waiver is found, the scope of the waiver is limited to the information disclosed, unless a broader waiver is made necessary by the intentional and

misleading use of privileged or protected communications or information. The Explanatory Note also states that subject matter waiver is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary. Thus, subject matter waiver is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner, in order to gain a tactical advantage.

OM contends that Harbinger has disclosed privileged communications that pertain not only to Harbinger's efforts to reverse the MIA decision, but also to "efforts to engage with OM and its counsel to seek approval of the Reinsurance Transaction.," and analysis and advice from attorneys regarding Harbinger's obligations under the SPA, including whether it had an obligation to make Remedial Efforts. In addition, OM contends that what Harbinger did to reverse the MIA's decision is "inextricably linked" to what Harbinger believed it was obligated to do to reverse the MIA's decision, and to Harbinger's efforts to engage with OM, and that communications on these subjects are therefore "part of the same subject matter." OM accordingly argues that Harbinger should be required to produce all privileged communications pertaining to these subjects.

Harbinger contends that the disclosure of privileged communications regarding its efforts to reverse the MIA decision constitutes a limited waiver of communications that "concern planning and actions with respect to the MIA," that does not extend to efforts to engage OM or counsel's interpretation of Harbinger's obligations under the SPA, which are not the same subject matter.

In order to determine the scope of Harbinger's subject matter waiver, it is necessary to look at the substance of the privileged documents produced pursuant to the waiver. I have

reviewed thirteen documents identified by OM that have been voluntarily produced by Harbinger pursuant to its subject matter waiver. Notably, these documents reflect communications pertaining to Harbinger's efforts to seek reversal of the MIA's decision in the limited context of dealings with the MIA.² The MIA initially communicated its denial in a telephone conference. Most of the disclosed communications reflect discussions internally at Harbinger and with OM regarding whether to request a "reasoned" written denial, whether to request a draft opinion, and whether to withdraw the application or request that the MIA defer a written denial in order to give the parties an opportunity to propose acceptable terms. Of particular concern to Harbinger was the effect of these procedural alternatives on the running of the 150 days for negotiation. These documents do not reflect privileged communications regarding "efforts to engage OM" in the negotiation of alternative terms. More importantly, it is not readily apparent how these documents support Harbinger's position in the litigation, or, as your Honor remarked in hearings on this issue, how the disclosed documents "suit their purpose." Accordingly, I find that Harbinger has not selectively disclosed these documents for tactical advantage, and that fairness does not require disclosure of communications on the broader subject of efforts to engage OM in the negotiation of alternative terms.

The only privileged document identified by OM that refers to counsel's interpretation of the SPA is an email containing "Talking Points" for a call or meeting with the MIA, in which Harbinger's lead outside counsel tells an in-house lawyer that it is important not to make any statement in front of OM that "concede[s] that we have an obligation to revise the transaction in the absence of an MIA a requirement to do so (which is the literal language of the SPA). We

² I recognize that Harbinger's formulation of its subject matter waiver can be interpreted literally to include efforts to engage OM in negotiations regarding alternative terms. However, this formulation cannot, by itself, effect a waiver beyond the subject matter of privileged documents actually disclosed.

want to preserve the possibility of fighting them on that point although I doubt we will.”³ I find, however, that this isolated disclosure of Harbinger’s strategy does not constitute the misleading use of privileged or protected communications or information that in fairness requires the production of all communications containing counsel’s legal opinion and advice regarding the requirements of the SPA.⁴

ALLOCATION OF COSTS

Paragraph 7 of the Order Appointing a Special Discovery Master provides that “Defendant shall bear the costs and fees associated with the Special Master * * * unless the Special Master determines in her discretion that a portion or all of the cost should be reallocated to Plaintiff.” In light of my determination that the vast majority of Harbinger’s privilege designations were proper, and my determination with respect to subject matter waiver, there is no basis for a reallocation of any costs or fees to Plaintiff.

³ HARB-E0162608.

⁴ OM incorrectly asserts that Harbinger’s primary outside counsel, Michael Devins, testified “extensively” at his deposition about his analysis of Harbinger’s obligations under the SPA and the legal advice provided to Harbinger on that topic. I have read the transcript of the Devins deposition, and reviewed the exhibits presented at the deposition. Although Mr. Devins describes the subject matter of certain communications with his client, I find that neither his testimony, nor the deposition exhibits, discloses what was actually communicated to the client. Indeed, Harbinger’s counsel objected to OM’s attempt to elicit such testimony. Accordingly, I find that Mr. Devins’s deposition testimony did not effect a waiver of the privilege with respect to counsel’s interpretation of Harbinger’s legal obligations under the SPA.

PROCEDURE FOR FILING OBJECTIONS

The parties are directed to file any objections to this Report and Recommendation with Judge Peck no later than September 9, 2013, and are requested to provide a copy of such objections to the Special Master.

Respectfully submitted,

Kathleen A. Roberts

KATHLEEN A. ROBERTS
SPECIAL MASTER

August 22, 2013

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Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Redaction Log for Special Master Review

Page	Case No.	Case No.	Case No.	Case No.
73	HARB-E0027850	HARB-E0027856	Not Privileged	Redaction does not contain legal advice or a request for legal advice
77	HARB-E0027876	HARB-E0027878	Not Privileged	Redaction does not contain legal advice or a request for legal advice
148	HARB-E0029390	HARB-E0029393	Not Privileged	Redaction does not contain legal advice or a request for legal advice
239	HARB-E0033577	HARB-E0033587	Not Privileged	Redaction does not contain legal advice or a request for legal advice
956	HARB-E0111119	HARB-E0111123	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1061	HARB-E0111907	HARB-E0111912	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1062	HARB-E0111918	HARB-E0111924	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1083	HARB-E0112147	HARB-E0112149	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1211	HARB-E0115637	HARB-E0115666	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1529	HARB-E0132102	HARB-E0132106	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1569	HARB-E0134177	HARB-E0134179	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1601	HARB-E0136157	HARB-E0136159	Not Privileged	Redaction does not contain legal advice or a request for legal advice

Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Redaction Log for Special Master Review

1604	HARB-E0136184	HARB-E0136187	Redaction on Bates 187 Not Privileged	Redaction does not contain legal advice or a request for legal advice
1605	HARB-E0136188	HARB-E0136191	Redaction on Bates 191 Not Privileged	Redaction does not contain legal advice or a request for legal advice
1607	HARB-E0136202	HARB-E0136203	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1627	HARB-E0136688	HARB-E0136690	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1642	HARB-E0136820	HARB-E0136821	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1738	HARB-E0140226	HARB-E0140227	Not Privileged	Redaction does not contain legal advice or a request for legal advice
1908	HARB-E0143443	HARB-E0143445	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3113	HARB-E0166289	HARB-E0166296	First redacted paragraph Not Privileged	Redaction does not contain legal advice or a request for legal advice
3121	HARB-E0167152	HARB-E0167159	First redacted paragraph Not Privileged	Redaction does not contain legal advice or a request for legal advice
3130	HARB-E0167129	HARB-E0167136	Not Privileged	Redaction does not contain legal advice or a request for legal advice

Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Redaction Log for Special Master Review

3138	HARB-E0166125	HARB-E0166128	Redaction on Bates 127 Not Privileged	Redaction does not contain legal advice or a request for legal advice
3140	HARB-E0166140	HARB-E0166141	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3141	HARB-E0166142	HARB-E0166143	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3142	HARB-E0166144	HARB-E0166146	Redaction on Bates 145 Not Privileged	Redaction does not contain legal advice or a request for legal advice
3143	HARB-E0167189	HARB-E0167190	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3144	HARB-E0167191	HARB-E0167192	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3145	HARB-E0167193	HARB-E0167194	Redaction on Bates 194 Not Privileged	Redaction does not contain legal advice or a request for legal advice
3162	HARB-E0169809	HARB-E0169810	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3163	HARB-E0169811	HARB-E0169812	Not Privileged	Redaction does not contain legal advice or a request for legal advice
3164	HARB-E0169813	HARB-E0169814	Not Privileged	Redaction does not contain legal advice or a request for legal advice

Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Withhold Log for Special Master Review

7014	1421552	1421552	Produce Glass email to Board Members @ 1:43	Email to be produced does not contain legal advice or a request for legal advice
7015	1421553	1421553	Produce Glass email to Board Members @ 1:43	Email to be produced does not contain legal advice or a request for legal advice
7016	1421554	1421555	Produce Glass email to Board Members @ 1:43	Email to be produced does not contain legal advice or a request for legal advice
7030	10804171	10804171	Not Privileged	Document does not contain legal advice or a request for legal advice
7031	10806711	10806711	Not Privileged	Document does not contain legal advice or a request for legal advice
7032	10806956	10806956	Not Privileged	Document does not contain legal advice or a request for legal advice
7033	10807205	10807205	Redact first email (McKnight @ 5:53); produce remainder of document	Emails to be produced do not contain legal advice or a request for legal advice
7034	10807206	10807206	Redact Glass email @ 6:15; (McKnight email @ 5:53); produce remainder of document	Emails to be produced do not contain legal advice or a request for legal advice
7117	1416830	1416830	Not Privileged	Document does not contain legal advice or a request for legal advice

Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Withhold Log for Special Master Review

7118	1420605	1420605	Not Privileged	Document does not contain legal advice or a request for legal advice
7119	1421212	1421212	Not Privileged	Document does not contain legal advice or a request for legal advice
7120	1421213	1421213	Redact first two emails (Gass @ 4:33; Glass @ 9:35); produce remainder of document	Emails to be produced do not contain legal advice or a request for legal advice
7121	1421219	1421219	Redact Gass email @ 4:33; produce remainder of document	Emails to be produced do not contain legal advice or a request for legal advice
7166	1808200	1808201	Not Privileged	Document does not contain legal advice or a request for legal advice
7286	1816135	1816135	Not Privileged	Document does not contain legal advice or a request for legal advice
7401	7503919	7503920	Redact Maura email @ 7:51; produce remainder of document	Emails to be produced do not contain legal advice or a request for legal advice
7402	7503928	7503929	Redact Maura emails @ 7:51 and 8:03; redact Glass email @ 2:57; produce remainder of document	Emails to be produced do not contain legal advice or a request for legal advice

7629	1819555	1819557	Not Privileged	Document does not contain legal advice or a request for legal advice
8193	1426409	1426409	Not Privileged	Document does not contain legal advice or a request for legal advice
8496	13015457	13015470	Not Privileged	Document does not contain legal advice or a request for legal advice; predominant purpose is business
8531	5000890	5000895	Not Privileged	Document does not contain legal advice or a request for legal advice; predominant purpose is business
8533	5006131	5006137	Not Privileged	Document does not contain legal advice or a request for legal advice; predominant purpose is business
8623	65104551	65104553	Redact first email @ 3:06; produce remainder of document	Email to be produced does not contain legal advice or a request for legal advice
8706	5009111	5009112	Not Privileged	Document does not contain legal advice or a request for legal advice (scheduling)

Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Withhold Log for Special Master Review

8733	14900002	14900002	Not Privileged	Document does not contain legal advice or a request for legal advice; predominant purpose is business
9227	4606208	4606209	Not Privileged	Document does not contain legal advice or a request for legal advice (scheduling)
9228	4606206	4606207	Not Privileged	Document does not contain legal advice or a request for legal advice (scheduling)
9244	4601469	4601469	Not Privileged	Document does not contain legal advice or a request for legal advice
9252	12101309	12101309	Not Privileged	Document does not contain legal advice or a request for legal advice
9272	14806214	14806216	Not Privileged	Document does not contain legal advice or a request for legal advice
9273	15407260	15407262	Not Privileged	Document does not contain legal advice or a request for legal advice
9274	19203047	19203049	Not Privileged	Document does not contain legal advice or a request for legal advice
9275	19203050	19203051	Not Privileged	Document does not contain legal advice or a request for legal advice
9277	24914191	24914193	Not Privileged	Document does not contain legal advice or a request for legal advice

Harbinger F&G LLC v. OM Group (UK) Limited, No. 12-cv-5315
Harbinger – Email Withhold Log for Special Master Review

9278	24914194	24914197	Not Privileged	Document does not contain legal advice or a request for legal advice
9279	24914198	24914200	Not Privileged	Document does not contain legal advice or a request for legal advice
9280	24914201	24914204	Not Privileged	Document does not contain legal advice or a request for legal advice
9281	24914205	24914208	Not Privileged	Document does not contain legal advice or a request for legal advice
9282	24914216	24914219	Not Privileged	Document does not contain legal advice or a request for legal advice
9365	15403053	15403080	Not Privileged	Document does not contain legal advice or a request for legal advice
9368	24911540	24911541	Not privileged	Document does not contain legal advice or a request for legal advice
9402	24916510	24916510	Not Privileged	Document does not contain legal advice or a request for legal advice